Filed 3/17/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MERCURY INSURANCE COMPANY, Plaintiff, Cross-defendant and Respondent, v. FRANCISCO AYALA et al., Defendants, Cross-complainants and Appellants.	B165390 (Los Angeles County Super. Ct. No. KC037928)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael L. Stern, Judge. Affirmed.

Wendy Rossi for Defendants, Cross-complainants and Appellants.

Wesierski & Zurek and Christopher P. Wesierski and Laura J. Barns for Plaintiff, Cross-defendant and Respondent.

---

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of section 1 of the Discussion.

This case, which concerns uninsured motorist coverage, comes to us after judgment was entered in favor of respondent Mercury Insurance Company on its complaint for declaratory relief and on the cross-complaint for declaratory relief, breach of contract, and bad faith filed by the insureds, appellants Maria Medina and her husband Francisco Ayala. We affirm.

Factual and Procedural Summary

In October of 1991, Medina was struck by a car driven by an uninsured motorist. She worked for Robinsons-May, and the accident took place in the employee parking lot. Robinsons-May, which is self-insured for workers' compensation claims, paid her medical and other expenses in an amount which exceeded $15,000.

Medina and Ayala[1] had automobile insurance with Mercury. The declarations page lists uninsured motorist bodily injury coverage limits of $15,000 per person and $30,000 per accident. Ayala and Medina made claims under that coverage. Mercury denied the claims, then sued for declaratory relief, seeking a declaration that both claims were subject to a single $15,000 per person limit and that the limit was exhausted because it was reduced by the workers' compensation benefits paid to Medina. Appellants cross-complained for declaratory relief, breach of contract, and bad faith.

Mercury moved for summary judgment on the complaint. The court granted the motion, finding that the claims were not covered. Mercury demurred to the amended cross-complaint on that ground. The demurrer was sustained and judgment was entered in Mercury's favor.

---

[1] The declarations page lists Ayala as the named insured and the policy defines "named insured" to include the spouse of the named insured.

Discussion

……[The portion of this opinion that follows, section 1 under Discussion,……
……is deleted from publication. See, post, at page 4, where publication is to resume.]……

1. Mercury's reliance on a specimen policy

Appellants were insured under policy No. AP 89053174. An insurance policy marked "specimen" and a declarations page specific to appellants' policy were attached to Mercury's complaint, and Mercury's summary judgment motion proposed undisputed facts based on the language of that specimen. At summary judgment, Mercury submitted a declaration of counsel that the specimen attached was "a true and correct specimen policy for AP 89053174."

Appellants made relevance objections to all the undisputed facts which relied on the specimen policy and made hearsay and best evidence objections to counsel's declaration, contending that there was no foundation that the specimen was a copy of the policy delivered to them when they purchased the policy from Mercury, or that they were given notice of any changes to the policy originally delivered.

Appellants proposed as undisputed that Mercury did not know the terms and conditions of their policy, citing in support evidence that during discovery, they sought the complete policy and all communications from Mercury prior to the accident, and that in response Mercury produced only the declarations page.

On this appeal, appellants contend that the trial court abused its discretion in overruling their objection to the declaration of counsel and in considering facts based on the specimen policy, because the declaration did not explain how the attorney knew which policies, forms, notices, or declarations were issued to them by Mercury. Appellants argue that Mercury was not entitled to summary judgment because it did not prove the terms of the policy. (*Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440 [insurer moving for summary judgment in a coverage dispute has burden of proving relevant terms of the policy].)

In response, Mercury points to the fact that appellants' amended cross-complaint, which alleges that appellants themselves do not have a copy of their policy, attaches the specimen policy, describes it as an exemplar obtained from Mercury, and alleges that the claims are covered under the language of that policy. Mercury finds in these allegations a judicial admission that the specimen policy is identical to appellants' policy.

We agree with Mercury, and cannot find that the trial court erred by rejecting appellants' objections to the use of the specimen policy or by basing its substantive rulings on the language of that policy. Moreover, there was a foundation, albeit a bare one, for the proposed undisputed facts which quoted the language of the policy. It is found in counsel's declaration that the specimen policy was a specimen of appellants' policy. We do not see that counsel was required to specify the factual basis for her knowledge, and appellants cite no authority to that effect. We similarly see nothing in Mercury's discovery responses which would support the assertion that Mercury does not know the terms and conditions of appellants' policy. Mercury asserted that the attached policy was the policy issued to appellants and supported that assertion with the declaration of counsel. Nothing else was required.

……..[The balance of the opinion is to be published.]……

2. Coverage: Which limit applies?[2]

Part IV of appellants' policy is entitled "Uninsured Motorists Coverage." In it, Mercury promises to pay "all sums which the insured . . . shall be legally entitled to recover as damages from the owner, or operator of an uninsured motor vehicle because of bodily injury, sustained by the insured, caused by accident and arising out of the . . . use of such uninsured motor vehicles . . . ."

---

[2] As Mercury notes in its brief, aside from contesting the use of the specimen policy, appellants do not contest Mercury's right to a set off from the workers' compensation benefits paid to Medina.

The next part of the policy, titled "Part IV -- Conditions," includes the provision that "The limit of liability stated in the declarations as applicable to 'each person' is the limit of the company's liability for all damages arising out of bodily injury sustained by one person in any one accident, . . . For the purposes of this provision, the 'bodily injury sustained by any one person' as used herein, shall be deemed to include all injury and damages for care, loss of consortium and injury to any interpersonal relationship sustained by others as a consequence of such bodily injury." The second quoted sentence is in bold face. At summary judgment, Mercury contended that the unambiguous language of this clause meant that the per person limit of $15,000, not the per accident limit of $30,000, applies to appellants' claims.

Appellants make two claims, that the per accident limit applies under the terms of the policy and that the per accident limit must apply, because Insurance Code section 11580.2 mandates that it does.

As to the policy itself, we agree with Mercury that the language is unambiguous. We thus give effect to its plain meaning (*Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141, 1149), which is clearly the one Mercury ascribes to it -- the per person limit applies. Numerous cases beginning with *United Services Automobile Assn. v. Warner* (1976) 64 Cal.App.3d 957 have construed similar language in liability policies and have found that the language is unambiguous and means what Mercury, and we, say that it means.

Appellants seek a different result, citing *Abellon v. Hartford Ins. Co.* (1985) 167 Cal.App.3d 21. *Abellon*, like *Warner*, is a declaratory relief action filed by an insurer after its insured was in a car accident and was sued not only by the other driver, but by that driver's spouse on a loss of consortium claim. Neither case involves uninsured motorist coverage, but in both cases, the insurer sought a declaration that the per person, not the per accident, limit of the liability coverage applied. *Warner* found that the per person limit applied, and *Abellon* found that the per accident limit applied. However, in

Warner, the policy language was like the language before us,[3] and in *Abellon* there was no similar language defining "bodily injury to any one person" to include the loss of consortium sustained by another. Instead, the insured in *Abellon* case had "no notice when it purchased the policy that loss of consortium damages fell within the purview of the 'per person' limitation." (*Id.* at p. 31.) *Abellon* does not help us construe appellants' policy.

We next consider appellants' statutory argument. Insurance Code section 11580.2 sets out the minimum uninsured motorist coverage which every car insurance policy must include. It is designed to ensure that drivers injured by uninsured motorists drivers are protected to the same extent they would have been if the driver at fault had carried the statutory minimum of liability insurance. If a policy conflicts with the statute, the statute prevails. (*Hartford Casualty Ins. Co. v. Cancilla* (1994) 28 Cal.App.4th 1305, 1310.)

Insurance Code section 11580.2 sets out the minimum coverage in two ways. First, it provides that unless the insured agrees in writing to the contrary, the uninsured motorist coverage must have limits at least equal to the limits of liability for bodily injury in the underlying policy of insurance. (Ins. Code, § 11580.2, subd. (a)(1); (m).) Appellants' policy complies with this requirement. The uninsured motorist bodily injury coverage limits are the same as the bodily injury limits in the rest of the policy. Indeed, the definition of "bodily injury sustained by any one person" is the same in both coverages.

Insurance Code section 11580.2, subdivision (a)(1) also specifies that the uninsured motorist limits can be "no . . . less than the financial responsibility requirements specified in Section 16056 of the Vehicle Code insuring the insured . . . for all sums within the limits that he . . . shall be legally entitled to recover as damages for

---

[3] In *Warner*, the policy provided that "The limit of bodily injury liability stated in the declarations as applicable to 'each person' is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person as the result of any one occurrence." (*United Services Automobile Assn. v. Warner, supra,* 64 Cal.App.3d at p. 961.)

bodily injury or wrongful death from the owner or operator of an uninsured motor vehicle."

Vehicle Code section 16056, part of the Financial Responsibility Law, sets out the limits which a *liability* policy must include. By referencing this statute, the Insurance Code fulfills the intent behind Insurance Code section 11580.2, recovery in the amount that would have been available if the uninsured motorist had had coverage

Under the vehicle code, a liability policy must have a limit of "not less than fifteen thousand dollars ($15,000) because of bodily injury to or death of one person in any one accident and, subject to that limit for one person, to a limit of not less than thirty thousand dollars ($30,000) because of bodily injury to or death of two or more persons in any one accident . . . ." (Veh. Code, §16056, subd. (a).)

We bear in mind that "California courts are required to construe the uninsured motorist statute (Ins. Code, § 11580.2) in favor of coverage wherever possible" (*Craft v. State Farm Mut. Auto. Ins. Co.* (1993) 14 Cal.App.4th 1284, 1307), but cannot find for appellants here. Appellants have cited no case which holds that a liability policy fails to comply with statutory minimums if it defines "per person" to include loss of consortium, but many cases have approved use of the per person limit in such cases, where the policy language so provides.

Once again, Mercury cites *United Services Automobile Assn. v. Warner, supra,* 64 Cal.App.3d 957 and appellants cite *Abellon v. Hartford Ins. Co. supra,* 167 Cal.App.3d 21. We think that *Warner* not only represents the majority view, but is the better-reasoned case.

Warner examined existing case law from California and elsewhere and determined that in liability policies, "[T]he principle consistently followed has been that where one person was injured or killed in the accident or occurrence, the single injury limit applied, regardless of the number of persons damaged as a result of that injury." (*United Services Automobile Assn. v. Warner, supra,* 64 Cal.App.3d at p. 963.)

In contrast, *Abellon*, which never directly addressed the cases cited by *Warner*, found that because a loss of consortium claim is a distinct and individual injury, application of the per occurrence limit would defeat the public policy of this state as expressed by the Supreme Court in *Rodriguez v. Bethlehem Steel Corp* (1974) 12 Cal.3d 382, in which our Supreme Court overruled earlier precedent and declared that in California each spouse has a cause of action for loss of consortium caused by a negligent or intentional injury to the other spouse by a third party. (*Abellon v. Hartford Ins. Co. supra,* 167 Cal.App.3d at p. 26.)

Warner also rejected the contention that a loss of consortium is a physical injury to the second spouse, holding that "The cause of action for loss of consortium does not arise out of a bodily injury to the spouse suffering the loss; it arises out of the bodily injury to the spouse who can no longer perform the spousal functions. It is the loss of conjugal fellowship, affection, society and companionship which gives rise to the cause of action. (*Rodriguez v. Bethlehem Steel Corp*. [1974] 12 Cal.3d 382, 405-406.) Although a sensitive person may actually suffer physical illness as a result of being deprived of that conjugal affection, it is not that illness which gives rise to the claim. The fact that loss of consortium may have physical consequences does not convert the cause of action into an action for bodily injury to the spouse suffering the loss. Such consequences would be an element of damage, the consequential damage arising out of the bodily injury to the injured spouse." (*United Services Automobile Assn. v. Warner, supra,* 64 Cal.App.3d at pp. 964-965.)

Again, *Abellon* reached a different result, finding that loss of consortium could involve bodily injury, because emotional disturbances have physical aspects. (*Id.* at p. 27.)

We are unpersuaded by *Abellon*'s reasoning. First, the public policy which led the Supreme Court to recognize loss of consortium claims does not compel the application of the per accident limit. Insurance policies which limit coverage by including loss of consortium claims in the per person limit do not refuse to recognize the cause of action,

but merely limit insurance coverage which applies when one spouse is injured in an accident and the other spouse suffers from the consequences. And, while *Abellon* is surely right that the emotional distress suffered from a loss of consortium can, like any emotional distress, result in some physical symptoms, that possibility does not make a loss of consortium claim a bodily injury claim for purposes of Insurance Code section 11580.1 or Vehicle Code section 16056. "Although loss of consortium may have physical consequences, it is principally a form of mental suffering." (*Rodriguez v. Bethlehem Steel Corp*., *supra*, 12 Cal.3d at p. 401.) In contrast, *Warner's* reasoning on this point is good common sense and good legal sense.

We note, too, that elsewhere in insurance law, in the context of commercial general liability policies, "The cases overwhelmingly hold that the phrase 'bodily injury, sickness or disease' is plain and unambiguous and that coverage under the bodily injury clause is limited to physical injury to the body and does not include nonphysical, emotional or mental harm." (*Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 854.)

Perhaps most importantly, *Warner* represents the mainstream. (See *State Farm Mutual Auto Ins. Co. v. Ball* (1981) 127 Cal.App.3d 568, *Hauser v. State Farm Mut. Auto Ins. Co.* (1988) 205 Cal.App.3d 843, *Mid-Century Ins. Co. v. Bash* (1989) 211 Cal.App.3d 431, *Safeco Ins. Co. of America v. Simmons* (N.D.Cal.1986) 642 F.Supp. 305.) Under these cases, appellants' claims could have been subject to a "per person" limit in the uninsured motorist's liability insurance, if that driver had had insurance. Thus, application of *Warner* is consistent with the Legislative intent that an uninsured motorist claimant will get the same compensation he or she would have gotten if the uninsured motorist had had insurance.

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

ARMSTRONG, J.

I concur:

GRIGNON, J.

I concur in all of the analysis in the majority opinion except that I would resolve the admissibility of evidence issue on the judicial admission ground asserted by plaintiff.

TURNER, P.J.